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No. 83-

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF CALIFORNIA

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QUESTIONS PRESENTED

1. Does the failure of the prosecution to disclose to the defense promises of lenient treatment to crucial prosecution witnesses in exchange for their testimony compel reversal of the judgment of conviction against the defendant?

2. Is the defendant's Sixth Amendment right to compulsory process of witnesses violated where material defense witnesses assert their privileges against self-incrimination as a direct result of threats made against them by prosecutorial authorities that they themselves will be prosecuted should they testify on behalf of the defense?

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OPINION BELOW

The order of the Supreme Court of California denying petitioner's original petition for writ of habeas corpus {Crim. 23573} appears as Appendix "A" of this petition. No formal opinion was rendered by that Court.

JURISDICTION

Petitioner respectfully prays that a Writ of Certiorari issue to review the denial by the Supreme Court of California of his original petition for writ of habeas corpus in the case numbered Crim. 23573. Said petition was filed in that court on March 6, 1984 pursuant to that Court's original jurisdiction in habeas corpus matters (Article VI, Section 10, Constitution of California). Said petition was denied by the Court on April 19, 1984 and became final on that date (Rule 24(a), California Rules of Court. See also, Bryant v. Zimmerman (1928) 278 U.S. 63) Two justices of the California Supreme Court voted to grant the petition. (Appendix "A")

This Court's jurisdiction is invoked under 28 United States Code Sections 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person... shall be... deprived of life, liberty, or property without due process of law..."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor..."

United States Constitution. Amendment XIV:

"...nor shall any state deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

A. Proceedings in the State Court

Petitioner was convicted by a jury in the Superior Court of the State of California, in and for the County of San Diego, of the offenses of murder in the second degree (California Penal Code Section 187), conspiracy to commit extortion (California Penal Code Sections 518 and 182.1), conspiracy to commit assault with a deadly weapon (California Penal Code Sections 245(a) and 182.1) and simple assault, a misdemeanor (California Penal Code Section 240). As to the three felony counts, a principal was found to have been armed with a firearm (California Penal Code Section 12022(a)). (CT 308-309).

Upon conviction, petitioner moved the Court for a new trial and for modification of the verdict. These motions were denied. As to the murder count, petitioner was sentenced to a term of 15 years to life in state prison. The Court also imposed a one-year enhancement for the firearm allegation, to run consecutive to the 15 to life term (CT 266, 312).

As to each of the two counts of conspiracy, petitioner was sentenced to three years in state prison and received a one-year enhancement for the firearm allegation. These terms were ordered stayed by the trial court. As to the misdemeanor count, petitioner was sentenced to six months in the County Jail, such sentence to run concurrent to the term imposed as to the murder count (CT 312).

On March 6, 1984, petitioner filed in the California Supreme Court an original petition for writ of habeas corpus, alleging that petitioner had been deprived of due process of law by virtue of suppression of material evidence by the prosecution. The petition also demanded that petitioner be granted a new trial in view of the discovery of new credible evidence not previously available to the defense. {California Supreme Court case number Crim. 23573}. The petition was filed pursuant to that court's original jurisdiction in habeas corpus matters.

Said petition was based upon the records and documents from the trial court on file with the Court of Appeal, Fourth Appellate District, in People v. Martin/In re Martin on Habeas Corpus {1983} 150 CA.3d 148, as well as

the exhibits and documents attached to petition 23573. Among the exhibits attached to the petition and cited in support of such petition was the two to one published opinion of the Court of Appeal affirming petitioner's conviction in the above case of People v. Martin/In re Martin {Exhibit "Y" attached to the petition in case 23573}. Review of this Court of Appeal opinion is not sought in the instant petition. The Court of Appeal's opinion arose by way of direct appeal filed on behalf of petitioner {4 Crim. 13945} and a subsequent original petition for writ of habeas corpus {4 Crim. 15681} filed on September 6, 1983. The appeal in 4 Crim. 13945 and the petition for writ of habeas corpus {4 Crim. 15681} were consolidated by the Court of Appeal and on December 23, 1983 the judgment of conviction was

affirmed in the above-described two-to-one published opinion. In the same opinion, the petition for writ of habeas corpus was denied.

In the original petition for writ of habeas corpus filed on March 6, 1984 in the Supreme Court of California in Crim. 23573 petitioner asserted that his rights under the United States Consitution to due process of law and a fair trial were denied by the failure of the prosecutor to disclose inducements offered to key prosecution witnesses in exchange for their testimony, and by the intimidation of material defense witnesses by the prosecution which resulted in such witnesses refusing to testify at trial. The petition in Crim. 23573 included the same documentary evidence as was before the Court of Appeal in 4

Crim. 15681; however, supplemental juror affidavits, as well as the opinion of the Court of Appeal in 4 Crim. 13945/15681, were also supplied to the Supreme Court of California in case Crim. 23573. This petition was denied by the Supreme Court of California on April 19, 1984, although two justices voted to grant the petition {Appendix "A"}.

It is the denial of the petition for writ of habeas corpus by the Supreme Court of California in Crim. 23573 on April 19, 1984, to which the instant petition for writ of certiorari is directed.

B. Statement of Facts

The following factual summary is taken from the trial record, which was incorporated by reference in the

petition filed with the Supreme Court of California in Crim. 23573 and the exhibits filed with that Court in support of the petition, which exhibits included that published opinion of the Court of Appeal in People v. Martin/In re Martin on Habeas Corpus, (1983) 150 CA.3d 148.

The record reveals that the victim in this case, Richard Crake, a San Diego area attorney, was murdered by one Andrew James Powell, on or about May 12, 1981 (RT 1003-1005).

Petitioner herein was tried and convicted on a theory of vicarious liability, i.e., conspiracy, there being no indication at trial that petitioner's alleged acts were done with any subjective intent to kill on his part. Accordingly, the People's case below was predicated almost

entirely on the testimony of alleged conspirator Powell, which the Court of Appeal deemed to be "pivotal" {Opinion of the Court of Appeal, Exhibit "Y" attached to the petition for writ of habeas corpus in case no. Crim. 23573, p. 26}.

Powell, who had previously pled guilty to the murder of Crake, testified at trial that beginning March 23, 1981, he worked for petitioner at Anear Insurance Company performing general office duties {RT 945-946}.

Petitioner, a former captain in the United States Army, had founded Anear Insurance Company in 1975 after having voluntarily and successfully worked for the Department of Justice to obtain convictions of members of organized crime. Petitioner, who at the time of trial was 62 years old and in poor

health, was given a new identity by the United States government following the completion of these operations. The United States Government thereafter moved petitioner, his wife and family to the San Diego area out of fear for the safety of petitioner and his family {CT 231-232; RT 1845-1846}.

At trial, San Diego attorney Donald F. McClean, Jr. testified as to litigation between petitioner and one George Frieh. During the pendency of this litigation appellant was deposed by Richard Crake. During the deposition, petitioner, on the advice of counsel, refused to answer certain questions concerning his {petitioner's} background due to the nature of his previous activities with the Department of Justice and out of fear for his family's safety. {RT 1804, 1845-1846}.

Over petitioner's objection, evidence was admitted at trial that petitioner had stated to Robert Noel, a United States Attorney, that if ordered to answer certain questions about his work with the Department of Justice, he {petitioner} would commit perjury rather than reveal details about his background that might endanger himself or his family {RT 1789-1790}.

Andrew Powell's testimony, in substance, was to the effect that petitioner sent Powell to see Crake and tell Crake that Petitioner wanted the money owed him {$100,000}. According to Powell, Powell and one Kathleen Piascik {aka "Cass"} thereafter visited Crake although Powell testified at trial that he did not know why he visited Crake {RT 1154}. Powell stated that in the course of this visit Crake "went into a

rage". A struggle ensued between Crake and Powell. Powell testified that Crake fell and pulled Powell on top of him. In the course of the struggle, Powell struck Crake with a gun allegedly provided by petitioner RT 1003-1005).

Powell testified as to two meetings he claimed to have had with petitioner on May 11, 1981, the day before the Crake homicide. Powell stated that at 8:30 or 9:00 a.m. that morning petitioner provided him with Crake's address. Later that morning following a second meeting with Petitioner, Powell claimed that he obtained the weapon subsequently taken by him to Crake's residence, from petitioner's vehicle. (RT 981-983, 1047-1048).

James Harris Murphy, who was employed as a Deputy United States

Marshall during May of 1981, and was also acquainted with petitioner, testified that he was telephoned by petitioner on the morning or afternoon of May 11 {RT 1742}. Petitioner asked Murphy to obtain an address and telephone number for Richard Crake because petitioner had papers to serve on Crake in connection with a pending lawsuit {RT 1743}. About six months earlier petitioner had called Murphy and asked him to verify an address for Crake {RT 1744}.

Murphy forwarded the request to the fugitive detail of the Marshall's office, but did not receive the information requested until 3:30 p.m., at which time he forwarded the information to petitioner. {RT 1744-1746}. This was six to seven hours after Powell alleged he received the

address from petitioner.

The morning after the Crake homicide, while driving to work, Powell was arrested. {RT 1014}. Powell admitted at trial that he lied to police officers when he indicated to them that he had no involvement in Crake's death {RT 1014}.

The record reveals, through the testimony of Powell's girlfriend, Michelle Goff, and other acquaintances of Powell, i.e., Mark Adelman, president of Universal Consumer Benefit Associates; Lowell English, a retired Marine Corps Major General; and Madelaine Payton, Powell's ex-wife, that Powell's reputation for truth and veracity was poor {RT 1999-2000, 2071, 2103}. However, the defense was not permitted to offer evidence relating to past statements of Powell tending to

show that he was a pathological liar {RT 1035}, such as testimony that Powell told Michelle Goff that he played professional football for the Buffalo Bills for ten years and that he played cornerback, and that he also played in Philadelphia and Baltimore; that he told Goff that he was having trouble collecting his retirement money from the he National Football League {PHT 55, 168}; and that he also apparently lied at the preliminary hearing as to where he went to college {PHT 54, 363}.

Steve Aguilar, also called as a witness on behalf of petitioner, testified that he met Andrew Powell in 1979 or 1980, when they both were employed by Harrison Buick {RT 1901}. In March of 1981, Powell called Aguilar and asked him if he would like to make

a thousand dollars. On May 11, 1981, Powell again called Aguilar and again asked if Aguilar would like to make a thousand dollars (RT 1901-1902). Powell, during this conversation, also asked Aguilar if Aguilar could obtain an "unmarked gun" for Powell (RT 1903).

That same day, at 1:00 or 1:30 p.m., Powell came to Harrison Buick driving a large Cadillac. Powell picked up Aguilar and they drove to Aguilar's apartment complex, where Aguilar obtained a gun, a loaded .357 Magnum, from one Charles Riley, who lived in Aguilar's complex. (RT 1903-1905; 1930, 1938).

The following day, Aguilar learned that there was "a murder. . . in La Jolla" and that Powell had been arrested. Aguilar held the gun for a week, strongly suspecting that the

weapon was used by Powell in the murder; he then disposed of the gun in a dumpster because he was "too frightened to even think" {RT 1951-1952}.

Following his testimony at trial, Steven Aguilar was placed under arrest while leaving the courtroom in front of other defense witnesses.

San Diego County Superior Court records reveal no charges ever being filed against Aguilar in connection with this arrest. Aguilar was released on his own recognizance the day following his arrest, and the Court reprimanded the District Attorney on the record for the arrest of Aguilar. {RT 1995-1996} Subsequently, several defense witnesses refused to testify, and asserted their privileges against self-incrimination. {RT 2050-2060; CT

300-301}.

Exhibits lodged with the trial court and the Court of Appeal indicated that one of these witnesses, Charles Riley, would have corroborated the testimony of Steven Aguilar regarding where Powell obtained the murder weapon; and that two other witnesses who refused to testify at trial, John Gross and Eugene Wallace, who were acquainted with Powell, would have testified that Powell fabricated his story implicating appellant in the Richard Crake homicide. Trial counsel, citing these court's exhibits requested at trial that these witnesses be granted immunity by the trial court, after the District Attorney refused to grant such immunity {RT 2052}, but this request was denied {RT 2055-2056}.

Exhibits filed with the Court of

Appeal and the California Supreme Court indicate that Mr. Riley and Mr. Wallace refused to testify on petitioner's behalf at petitioner's trial because they had been threatened with prosecution by agents of the San Diego County District Attorney's office and had read, prior to their proposed testimony, newspaper accounts of the arrest of Steven Aguilar {Exhibits A, F and I, in case nos. 4 Crim. 15681 and Crim. 23573}.

Steven Jarrett, an inmate at the county jail who had suffered felony convictions for prior theft-related offenses {RT 1869}, testified on behalf of the prosecution. Between September 17, 1981 and November of 1981, Jarrett was a trustee at the county jail. At some point during that time period, Jarrett had a conversation with

petitioner. Jarrett asked petitioner why petitioner was in jail, "if the other guy was the one that committed the murder" {RT 1870-1971}. Petitioner supposedly made a statement to the effect that there were two black inmates in jail who were Powell's friends, and that the matter could be cleared up if they would testify that they gave Powell the gun; and further, that if they so testified, petitioner would give them both $5,000 and bail them out {RT 1872-1873}. Jarrett was not asked at trial if appellant indicated why he felt it would be necessary to give these inmates $5,000. However, the District Attorney, over defense objection was specifically allowed by the trial court, during closing argument, to raise the inference that petitioner unsuccessfully attempted to bribe these

two inmates {RT 2210.}

In the course of his testimony, Jarrett was asked if any promises of leniency or favorable treatment had been given him by the prosecution, and he replied "none". However, Court records on file with the Court of Appeal and Californis Supreme Court, as well as Jarrett's statement, indicate that such promises were made to Jarrett in connection with his own pending criminal matters, specifically in exchange for his testimony against petitioner {Exhibits L, M, N, W attached to petition 23573; See also, opinion of the Court of Appeal, Exhibit "Y", case 23573, page 26}.

Similarly, in the case of Andrew Powell, the chief prosecution witness, exhibits were presented to both the Court of Appeal and to the California

Supreme Court demonstrating that Powell had received promises of favorable treatment in connection with his custodial status and institutional classification in exchange for his testimony against petitioner {Exhibits P, Q, R, S, T and U; Exhibit "Y", pages 24-26 all attached to the petition in case no. Crim. 23573}. However, Powell at trial denied that any inducements had been offered to him in exchange for his testimony {RT 1032}.

Neither the prosecutor's arrangement with Jarrett nor his arrangement with Powell was disclosed to petitioner's defense counsel prior to or during trial {Exhibits O, V in Crim. 23573}. In the course of closing argument, the prosecutor argued that there was no evidence that he [Powell] had been given any kind of deal for his

testimony. {Opinion of the Court of Appeal, Exhibit "Y" in case 23573, page 26}.

Also in the course of his closing argument, the prosecutor invited the jury to speculate if it would find petitioner guilty "if neither [petitioner nor Powell] testified" {RT 2300-2301}.

Petitioner, who did not testify at trial, moved through his counsel, for a mistrial pursuant to this Court's opinion in Griffin v. California {1965} 380 U.S. 609, noting that the prosecutor's comments "was a direct comment on my client's failure to testify" {RT 2301-2302}. This motion was denied by the trial court {2302}. Thereafter, the prosecutor, in describing Powell's alleged activities, asked the jury "Is there any other

explanation for what Powell did?" (RT 2303).

Petitioner's contention on his direct appeal that the prosecutor's comments constituted prejudicial Griffin error, particularly in view of the prior testimony that petitioner had allegedly indicated that he would commit perjury out of fear for his family's safety in connection with a deposition taken in a civil lawsuit rather than reveal his work with the Department of Justice, (RT 1804), was rejected by the Court of Appeal (Exhibit "Y" in case Crim. 23573, page 19).

Because the fact of inducements offered to key prosecution witnesses was not disclosed to the defense at trial (Exhibits O, V) this issue was necessarily raised in the first

instance by way of an original petition for writ of habeas corpus. Similarly, because the investigation and documentation of prosecutorial misconduct in this case on petitioner's behalf extended well beyond the conclusion of petitioner's trial {See, e.g., exhbits A-K; O,R, V-Z, this issue was likewise of necessity raised in the first instance by way of habeas corpus, as the necessary documentation of petitioner'`s claims was beyond the scope of the trial record.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT INCORRECTLY REFUSED TO GRANT PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS ON GROUNDS OF THE UNDISPUTED FAILURE OF THE PROSECUTOR IN THIS CASE TO DISCLOSE TO THE DEFENSE MATERIAL EVIDENCE RELATING TO THE CREDIBILITY OF KEY PROSECUTION WITNESSES

Petitioner, in his Petition for Writ of Habeas Corpus filed with the California Supreme Court, documents the fact that inducements were offered to key prosecution witnesses, Andrew Powell and Steven Jarrett in exchange for their testimony at petitioner's trial (petition for writ of habeas corpus filed in, Crim. 23573, pages 37-38). These inducements were not disclosed to the defense (see, exhibits

"O", "V", lodged with the petition for writ of habeas corpus in Crim. 23573}. Juror affidavits submitted to the California Supreme Court {Exhibit "Z" demonstrated that had such inducements been disclosed, the jury's verdict would have been altered.

In the case of Powell, the material inducement, among others, was a promise that the District Attorney would intercede on Powell's behalf for purposes of allowing him to obtain favorable treatment in institution selection within the California Department of Corrections once he was committed to state prison for second degree murder. {See also, Exhibits "D", "E", "P", "Q" and "U", attached to the California Supreme Court petition}.

In the case of Steven Jarrett, the

inducement was that the District Attorney would intervene on his behalf for the purpose of allowing Jarrett to obtain more favorable treatment at judgment and sentencing in his pending criminal case (Exhibit "W" attached to the California Supreme Court petition).

Jarrett's cooperation at petitioner's trial was in fact brought to the attention of the sentencing court in Jarrett's case, and the court in fact considered such cooperation in sentencing him to a total aggregate term of five years in state prison for the crimes for which he had entered pleas of guilty (Exhibit "L", "M", and "N"), as opposed to twelve years for his co-defendant.

Petitioner brought to the attention of the California Supreme

Court the fact that both witnesses at trial said that no promises for lenient treatment had been made to them in exchange for their testimony, and that the statements of the witnesses were not corrected by the District Attorney at trial {RT 1032, 1874}.

The published decision of the Court of Appeal, Fourth Appellate District {4 Crim. 13945/15681; 150 Cal.App.3d 148} was provided to the California Supreme Court as an exhibit in connection with Crim 23573. {Exhibit "Y"}.

Therein, the validity of the claims by petitioner that substantial material evidence had in fact been suppressed by the prosecution was neither questioned nor disputed by the Court of Appeal, who had access to the exhibits hereinabove cited. Indeed,

the Court of Appeal acknowledged that "the prosecution's failure [to disclose inducements made to defense witnesses] resulted in the suppression of substantial material evidence concerning the credibility of chief witnesses." {Emphasis Added; Page 27 of the Court's opinion; Exhibit "Y" before the California Supreme Court}. The Court of Appeal also acknowledged that Powell and Jarrett "denied promises of lenient treatment had been made to them in exchange for their testimony. The District Attorney sat by as this misleading testimony entered the record and in the case of Powell argued: `there is no evidence that he was given any kind of deal for his testimony'... aside from the exhibits accompanying the petition for habeas corpus it appears in the record this conduct was more than an oversight and

beyond benign neglect." (Opinion, page 26, emphasis added)

Nonetheless, the Supreme Court, when presented with the identical allegation which was previously before the Court of Appeal, summarily denied petitioner's claim, although two justices voted to grant the petition for writ of habeas corpus. (Appendix "A") Such denial not only perpetuated the denial of due process memorialized by the Court of Appeal in its published decision, but is inconsistent with numerous prior decision of this Court.

Clearly, a prosecutor must disclose evidence which would create a reasonable doubt of guilt that did not otherwise exist. See, this Court's opinion in Smith v. Phillips (1981) 455 U.S. 209, 219, citing United States v. Agurs (1976) 427 U.S. 97.

In Giglio v. United States (1971) 405 U.S. 150, 153 this Court summarized and reaffirmed the principles that the prosecutor must not only disclose to the defense substantial material evidence, but also is under a duty to correct false or misleading testimony which enters the record at trial:

> "As long ago as Mooney v. Holohan 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a Court and jurors by presentation of known false evidence is incompatible with 'rudimentary demands of justice'. This was reaffirmed in Pyle v. Kansas 317 U.S. 213 (1942). In Napue v. Illinois 360 U.S. 264 (1959), we said, '[t]he same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 269. Thereafter, Brady v. Maryland 373 U.S. at 87 held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of

> the prosecution.' [citation omitted]. When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue v. Illinois supra, at 269.... A finding of materiality of the evidence is required under Brady, supra, at 87. A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury... 'Napue v. Illinois supra, at 271."

The facts of Giglio, supra, are indistinguishable from the undisputed facts in this case. In Giglio, supra, the key witness against defendant was one Robert Taliento, the defendant's alleged co-conspirator in the offense charged and the only witness linking the defendant with the crime. Notwithstanding a promise having been made by the prosecution that Taliento would not be prosecuted in exchange for his testimony, Taliento testified at

trial, upon cross-examination by the defendant's defense attorney, that he believed that he could still be prosecuted notwithstanding his testimony against the defendant (Giglio, at pages 151-152). In summation, the prosecutor stated that Taliento "received no promises that he would not be indicted." (Giglio, at page 152.)

This Court reversed the judgment of conviction and remanded the cause noting that "Here the government's case depended almost entirely on Taliento's testimony; without it there would have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution

would be relevant to his credibility and the jury was entitled to know of it." (Giglio v. United States, supra, at pages 154-155, emphasis added)

In the instant case, as indicated in the documents before the California Supreme Court and as has previously been indicated to this court, inducements were made to key prosecution witnesses which were not disclosed by the prosecutor, which were denied by the witnesses in question at trial, which were not brought to the attention of the court and jury after the misleading testimony of the prosecution witnesses entered the record, and which in the case of Andrew Powell, were denied by the prosecutor in a misleading fashion in the course of summation (Exhibit "Y" attached to the California Supreme Court petition,

pages 24 to 27; see also, RT 2219}. Moreover, "Although Jarrett's testimony was important, Powell's testimony as a co-conspirator was pivotal." {Exhibit "Y" Opinion of the Court of Appeal attached to the California Supreme Court petition, page 26}. Apparently, at least three of the jurors, including the jury foreman, who heard petitioner's case agreed with this evaluation {Exhibit "Z" in case Crim. 23573}.

Clearly, the documentation presented to the California Supreme Court, on its face, demonstrated that "suppression of material evidence [which] justifies a new trial" occurred in the present case. Giglio v. United States, supra at page 153; Brady v. Maryland, supra at page 87.

Under the foregoing circumstances,

a writ of certiorari must be issued so that the principals of Brady and Giglio, ignored in this case, may be reaffirmed; and to review the denial of petitioner's petition for writ of habeas corpus by the California Supreme Court; and to preserve petitioner's right to due process of law under the Fifth Amendment to the United States Constitution.

II. REPEATED ACTS OF WITNESS INTIMIDATION PERPETRATED BY THE PROSECUTOR IN THE COURSE OF HIS PROSECUTION OF PETITIONER, DEPRIVED PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW; THE REFUSAL OF THE CALIFORNIA SUPREME COURT TO GRANT RELIEF ON THIS GROUND DEMANDS REVIEW BY THIS COURT

Exhibits lodged by petitioner in connection with his petition for writ of habeas corpus in Crim. 23573 document a continuous and blatantly prejudicial pattern of intimidation of defense witnesses carried out by the San Diego County District Attorney's office, which effectively rendered material witnesses unavailable to petitioner at trial and therefore deprived petitioner of due process of law. Defense witnesses' and potential defense witnesses were subjected to threats, express and implied, of

prosecution for "crimes" purportedly relating not only to the witnesses' proposed testimony, but also to matters totally unrelated to petitioner's case (Exhibits "A", "B", "C", "F", and "I", attached to the petitioner for writ of habeas corpus in Crim. 23573). In effect, witnesses were induced to exercise their privileges against self-incrimination not just on the basis of the incriminatory effect their testimony allegedly would have had, but on the basis of the prospect of selective prosecution, i.e., the possibility that were the witnesses to testify, they would be subjected to prosecution for the purported "crimes" which would otherwise be ignored by the District Attorney's office.

Probably the most blatant manifestation of prosecutor misconduct

appeared on March 8, 1982 and the days immediately following, in the arrest of Steven Aguilar outside the courtroom following his testimony. As has been indicated herein, Aguilar was arrested in full view of, and a few feet away from, two scheduled defense witnesses, as well as in front of representatives of the local press (Exhibits "A" through "D", case no. Crim. 23573). There can be little question that the Aguilar incident was perpetrated by the District Attorney's office in bad faith and for purposes of witness intimidation, as opposed to proper law enforcement motives. Aguilar was released on his own recognizance upon the recommendation of the Deputy District Attorney handling petitioner's case, within a day of his arrest (RT 1995-1996). Court records do not indicate that as a result of this

arrest he was charged with any crime. However, the event received extensive media coverage and caused Mr. Aguilar to lose his job {Exhibits "A", "E"}. This latter aspect of the Aguilar incident was specifically brought to the attention of defense witness Charles Riley by representatives of the San Diego County District Attorney's Office {Exhibits "A", "E" and "F"}. On the morning following the Aguilar incident, when Riley was scheduled to testify as a defense witness, Riley's memory was refreshed regarding the previous day's events and he was informed by the District Attorney's office that the same fate awaited him were he to take the stand and offer substantive testimony in petitioner's case. He thereupon took the stand and asserted his Fifth Amendment privilege against self-incrimination {Exhibits

"D", "F"; CT 300}.

Similarly, Eugene Wallace, who according to documentation provided by petitioner to the California Supreme Court {Exhibit "I",} had advised the San Diego County District Attorney's office that Andrew Powell had received the weapon used by Powell to kill the victim from Steven Aguilar, and who had also advised the District Attorney of a scheme by Powell to fabricate a story to the effect that petitioner, and not Aguilar, had supplied the weapon {Exhibit "I"; CT 301}, was informed by the District Attorney in September of 1981 that were he to so testify at petitioner's upcoming trial, he {Wallace} would be prosecuted as a "habitual criminal." Wallace, who prior to his proposed testimony at petitioner's trial had read newspaper

accounts of the arrest of Steven Aguilar, refused to testify at trial, and instead asserted his Fifth Amendment privilege against self-incrimination {Exhibit I; CT 301}. Wallace was never charged with being a "habitual criminal" {Exhibit "I"}.

Based upon the foregoing, there can be no question that material defense witnesses were made unavailable as a direct result of state action. Nor can there be any doubt that the misconduct of the district attorney's office was prejudicial in nature. The conduct of the prosecution, and subsequent media coverage, materially affected the decisions of Charles Riley and Eugene Wallace to asset their privileges against self-incrimination {Exhibits "F" and "I" attached to the petition in Crim. 23573}, thereby

effectively rendering these witnesses unavailable to the defense. The testimony that was not presented would have tended to corroborate Steven Aguilar's testimony to the effect that Andrew Powell received the murder weapon not from petitioner, but from Aguilar (Exhibits "F" and "I"). Also precluded was any opportunity on the part of the defense to demonstrate, through the testimony of Eugene Wallace, that Powell's testimony implicating petitioner in the Crake homicide was fabricated.

Clearly, similar principles apply to the situation outlined above as apply in the situation wherein the prosecutor fails to disclose inducements offered to material prosecution witnesses in exchange for their testimony. See, (subheading

number I, supra, and this Court's opinion in Giglio v. United States, supra, 405 U.S. 150 at 153 citing Brady v. Maryland, supra, 73 U.S. at 87 and other authorities cited therein). The witness intimidation which occurred in the instant case, of course, contains the additional element of "bad faith" on the part of the prosecution. Petitioner is mindful that this court, in United States v. Valenzuela-Bernal (1981) 458 U.S. 858, has recently reiterated the principles that in situations where as here, the prosecutor has acted to suppress material evidence, the material issue before the court is not the good or bad faith of the prosecution but whether the evidence suppressed is material to either guilt or punishment (at page 868 citing Brady v. Maryland, supra at page 87).

This court noted however, in Valenzuela-Bernal, that under the facts before it, which involved the deportation of alien witnesses, "no onus, in the sense of `hiding out' or `concealing' witnesses, attached to the government by reasons of its discharge of the obligations imposed upon it by Congress; its exercise of these manifold responsibilities is not to be judged by the standards by which might be appropriate if the government's only responsibility were to prosecute criminal offenses." At pages 865-866. Compare Freeman v. State of Georgia {5th Cir. 1979} 599 F.2d 65, {police detective concealed the location of witnesses.}

This court observed that "the responsibility of the Executive Branch to faithfully execute the immigration

policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." {Valenzuela-Bernal at page 872, emphasis added}.

The above language, particularly this court's citation to Freeman at page 866, suggests that the bad faith of the prosecutor may at least be a factor in determining whether the suppression of evidence is in fact traceable to prosecutorial conduct. For example, materials provided to the California Supreme Court, while containing documentation for the fact that material defense witnesses were intimidated by the prosecutor into exercising their privileges against

self-incrimination, also contains the conclusion from the Court of Appeal, which was privy to same information which was provided to the California Supreme Court, that "a potential witness' assertion of the Fifth Amendment privilege against self-incrimination is not conduct attributable to the prosecutor." (Exhibit "Y" in the petition for writ of habeas corpus in Crim 23573, page 24). Yet, in United States v. Smith (D.C. Cir. 1973) 478 F.2d 976, 979 the court was faced with the situation in which the prosecutor warned a defense witness that should such witness testify, he would face prosecution. The court observed:

> "we think the prosecutor's warning was plainly a threat that resulted in depriving the defendants of [a witness']

> testimony... even if the prosecutor's motive was impeccable, however, the implication of what he said was calculated to transform [the witness] from a willing witness to one who would refuse to testify and that in fact was the result."

In United States v. Morrison, (3rd Cir. 1976) 535 F.2d 223, prejudicial error was found where a prosecutor confronted a witness outside the court and threatened that witness with prosecution if she incriminated herself in anyway. The witness subsequently refused to answer a number of questions and the defendant was thereafter convicted. The court in Morrison reversed holding that the defendant was denied a fair trial and that he was deprived of his constitutional right to call witnesses in his defense by the actions of the prosecutor.

Petitioner would submit that the present case is virtually indistinguishable from Morrison, supra in that there can be no question that petitioner was denied due process of law and deprived of his Sixth Amendment right to compulsory process of witnesses by virtue of conduct directly attributable to the prosecution. The above authorities belie the notion appearing in the record before the Supreme Court in the form of the opinion of the Court of Appeal, that the exercise of the privilege against self-incrimination is not conduct attributable to the prosecutor, at least under the circumstances of this case.

Finally, petitioner would note that there can be absolutely no question that the evidence suppressed

herein was "material". With regard to the testimony of prospective witness Eugene Wallace, his proposed testimony to the effect that Powell fabricated his testimony against petitioner was clearly critical and not cumulative to any other evidence available to the defense. Compare, this court's opinion in United States v. Valenzuela-Bernal, supra at page 873. And while Valenzuela-Bernal requires that in order for sanctions to be imposed against the prosecution for suppression of evidence, a showing must be made that the evidence is "material" and favorable to the defense "in ways not merely cumulative to the testimony of available witnesses..." at page 873, it cannot be denied that the proposed testimony of Charles Riley and Eugene Wallace, even to the extent it would have been corroborative of the

testimony of Steven Aguilar, would have been "material" within the meaning of that term as it has previously been defined by this court, since such corroboration in turn would have directly undermined the credibility of the prosecution's key witness, co-conspirator, Andrew Powell (see, Giglio v. United States, supra, at pages 154-155).

In this connection, it should be noted that error such as occurred in this case has been held to constitue reversible error per se. See, United States v. McDonald (5th Cir. 1980) 620 F.2d 559, 564; United States v. Hammond (5th Cir. 1979) 598 F.2d 1008, 1013, citing this Court's Opinion in Webb v. Texas (1972) 409 U.S. 91.

Accordingly, a writ of certiorari must issue to review the Supreme

Court's failure to grant relief in this matter in accordance with petitioner's right to due process of law and it's failure to follow the principles previously laid down by this Court. Moreover, to the extent that conflict exists between this court's concept of "materiality" of suppressed evidence, as set forth in this court's opinions in Giglio and Webb on the one hand and Valenzuela-Bernal on the other, review is necessary to insure uniformity of decision and to provide guidance to the lower courts in the future.

CONCLUSION

For the reasons hereinable cited, petitioner respectfully prays that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX "A"

ORDER DENYING WRIT

OF HABEAS CORPUS

Criminal No. 23573

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
APR 19, 1984
LAURENCE P. GILL, Clerk

Deputy

In re HERMAN G. MARTIN

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

Bird, C.J. and Kause, J., are of the opinion the petition should be granted.

BIRD

Chief Justice

Office - Supreme Court, U.S.
FILED
SEP 12 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2057

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Under the facts of this case, is reversal compelled because the prosecution did not provide defense counsel at trial with discovery which might prove relevant in evaluating the credibility of prosecution witnesses?

2. Under the facts of this case, was the petitioner's Sixth Amendment right to compulsory process violated when proposed defense witnesses asserted their Fifth Amendment privilege against self-incrimination, purportedly as a result of threats made by the prosecution?

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No. 83-2057

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

On April 19, 1984 the California Supreme Court denied petitioner's original petition for writ of habeas corpus in case number 23573 without an opinion. (Appen. A.)

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JURISDICTION

Petitioner invokes jurisdiction of this Court under 28 U.S.C. section 1257(3). (Petn., p. 3.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions relied upon by petitioner are set out at pages 3 through 4 of the petition. Those provisions relied upon by respondent are set forth in Appendix B.

STATEMENT OF THE CASE

A. Proceedings in State Court

On March 19, 1982 following a month-long jury trial in San Diego County Superior Court, petitioner, Herman G. Martin, was convicted of second degree murder (Pen. Code, § 187); conspiracy to commit extortion (Pen. Code, §§ 182.1 and 518); conspiracy to commit an assault with a deadly weapon

(Pen. Code §§ 182.1 and 245, subd. (a)); and simple assault (Pen. Code, § 240). The jury found, in conjunction with the three felony counts, that a principal was armed with a firearm (Pen. Code, § 12022, subd. (a)). (CT II 212-215, 308-309.)[1/]

Petitioner was sentenced to an indeterminate term of 15 years to life for the murder conviction, plus a one-year consecutive term for the firearm allegation. State prison sentences were stayed on the conspiracy counts and a concurrent sentence was imposed for the simple assault. (CT II 265-267.)

Petitioner appealed the judgment of conviction to the California

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1. The designation "CT" refers to the clerk's transcript prepared in conjunction with the state court appeal in this case. The designation "RT" refers to the reporter's transcript on appeal.

Court of Appeal, case number 4 Crim. 13945. Prior to decision, petitioner filed a petition for writ of habeas corpus in the Court of Appeal, case number 4 Crim. 15681. The appeal and writ were consolidated by the Court of Appeal and decided on December 23, 1983. In a published decision (In re Martin (1983) 150 Cal.App.3d 148), the Court of Appeal denied the writ and affirmed the conviction.

On February 6, 1984 petitioner filed a petition for hearing in the California Supreme Court, asking that court to review the judgment of conviction and the denial of his writ filed in the Court of Appeal. (Pen. Code, § 1506.)

On March 6, 1984 petitioner filed an "original" petition for writ of habeas corpus in the California

Supreme Court, case number Crim. 23573, presenting identical issues as those then pending on the petition for hearing in 4 Crim. 15681. The same documentary support (the appellate record from 4 Crim. 13945 plus various exhibits attached to the petitions themselves) were presented in both Crim. 23573 and 4 Crim. 15681. The only difference in the support presented to the California Supreme Court in Crim. 23573 was the addition of juror affidavits. (Petn. 9-10.)[2/] The affidavits provided evidence of the mental processes of the respective jurors and, therefore, could not have been considered by the

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2. The fact the Court of Appeal's opinion was attached to Crim. 23573 does not separate that case from 4 Crim. 15681. (Petn. 10.) The Court of Appeal's opinion was appended to the petition for hearing filed in 4 Crim. 15681.

California Supreme Court because such evidence is inadmissible under California law. (Evid. Code, § 1150, subd. (a); People v. Hutchinson (1969) 71 Cal.2d 342, 349; People v. Ozene (1972) 27 Cal.App.3d 905, 914.)

On April 19, 1984 the petition for writ of habeas corpus in Crim. 23573 was denied. (Appen. A.) On the same date, the petition for hearing in 4 Crim. 13945/15681 was denied. (Appen. C.)

B. Statement of Facts

The petition depends heavily on the facts in an attempt to justify relief. The statement of facts contained in the petition (at pp. 10-28) is a distortion of the appellate record upon which it purports to be based, and violates the fundamental legal principle that a reviewing court view the evidence

in the light most favorable to the judgment. (See Taylor v. Mississippi (1943) 319 U.S. 583, 585-586; People v. Reilly (1970) 3 Cal.3d 421, 425.) The following statement of facts is taken from the Court of Appeal's published opinion and more fairly represents the evidence presented to the jury.

> "La Jolla attorney Richard Crake was murdered by Andrew James Powell on May 12, 1981. The death was probably the result of a severe blow to the head. Briefly, in the light most favorable to the judgment, the evidence shows Martin and Crake were embroiled in civil litigation arising from a dispute over a real estate transaction at the Sports Arena Square shopping center. During the course of discovery Martin became dissatisfied with the posture of the litigation. During a deposition Martin had threatened Crake with violence.
>
> "Michelle Goff worked for Martin's insurance company. Powell was Goff's boyfriend and she introduced him to Martin. Martin hired Powell

on March 23, 1981. Martin knew Powell could not make his child support payments. Martin also knew Powell was afraid he would be jailed for failure to pay. Martin used this as leverage and told Powell he wanted Powell to collect money Crake owed Martin. Martin told Powell to collect $100,000 from Crake and to beat him up.

"Martin gave Powell Crake's picture and business address. When Powell would not go to Crake's business, Martin supplied Crake's home address. Powell and a friend went to this address but discovered Crake no longer lived there. Powell called Martin long distance to tell him this address was incorrect.

"Martin obtained Crake's new address by contacting United States Marshal James Murphy telling Murphy he needed the address to serve papers in conjunction with his civil suit. Murphy provided Martin with Crake's address. Martin gave this address to Powell along with the keys to Martin's car and a bag containing a gun.

"Powell and a friend drove to Crake's house on May 12, 1981. They arrived at the guard station at approximately

9 p.m. Powell gave the guard a false name. The Crake family had returned from dinner approximately 9 p.m. Powell and his friend rang the doorbell and Crake answered. Powell sent the friend to the car and then told Crake he was there to collect $100,000 for Martin. Powell and Crake got into a fight. Powell shot Crake in the arm with Martin's gun. Powell hit Crake in the head with the gun between six and sixteen times. The blows eventually caused Crake's death. Crake's wife attempted to stop Powell but he pushed her away and fired the gun at her. Crake's daughter threw shoes and books at Powell.

"Powell covered with blood returned to the friend's car. They drove to Powell's house where he made a toll call to Martin, telling him the dirty work was done. When Goff returned at 10 p.m. she found blood on the carpet, shoes in the bathtub, and blood on Powell's jacket. Powell disposed of the jacket and the gun in a nearby dumpster scheduled to be picked up the following morning." (In re Martin, supra, 150 Cal.App.3d at pp. 156-157.)

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied. The federal constitutional issues were never reached by the California Supreme Court because adequate and independent state grounds existed to deny the petition in the California Supreme Court. The issues presented below were identical to issues then pending in a separate proceeding in the California Supreme Court. Thus, the petition was defective because it was duplicative. The petition below was defective because it depended entirely on the facts, and petitioner had not presented the petition in the first instance in a court capable of resolving factual disputes. Furthermore, petitioner was foreclosed from raising the issue of witness intimidation on habeas corpus, since the issue was decided on

his direct appeal. Habeas corpus may not serve as a second appeal.

Petitioner's claim that the prosecution failed to provide him with discovery relevant to the credibility of prosecution witnesses is unworthy of certiorari. Petitioner does not challenge the legal standard by which this issue was judged in the lower courts. Rather, petitioner argues the factual determination made below was incorrect. Thus, certiorari is inappropriate because petitioner asks this Court to serve as a reviewer of the facts, not as an arbiter of federal constitutional law.

Finally, petitioner seeks review to resolve an apparent conflict in this Court's decisions concerning the standard of prejudice in a case where the prosecution has intimidated defense witnesses. Certiorari is not

appropriate since the conflict the petition alludes to is imaginary. Furthermore, this issue is not properly raised in this petition because the issue was resolved on direct appeal by the Court of Appeal. Moreover, even if the issue exists, this Court would have to engage in an extensive factual review to determine if the factual predicate for review is present in this case. If, as the California Court of Appeal found, the factual predicate is lacking, the issue of prejudice will not be presented by this case. Accordingly, certiorari is not justified in this case.

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ARGUMENT

I

CERTIORARI DOES NOT LIE WHEN, AS HERE, ADEQUATE AND INDEPENDENT STATE GROUNDS SUPPORT THE JUDGMENT

It is, of course, incumbent upon this Court to ascertain for itself whether a non-federal ground independently and adequately supports the judgment of the state court. (Abie State Bank v. Bryan (1931) 282 U.S. 765, 773.) Although this Court has announced a number of principles in order to help determine whether various forms of references to state law constitute adequate and independent state grounds, there is no consistent approach taken to resolve this issue. (Michigan v. Long (July 6, 1983) ___ U.S. ___ [77 L.Ed.2d 1201].)

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When there is a doubt whether it is proper for this Court to take jurisdiction over a case, the doubt should serve to deny jurisdiction. (Dixon v. Duffy (1952) 344 U.S. 143, 147 [Jackson, J. dissenting]; Lynch v. New York (1934) 293 U.S. 52.) An ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved. (Michigan v. Long, supra, 77 L.Ed.2d 1201.) In the case at bar, there is considerable doubt as to whether the California Supreme Court decided to deny the writ based on state procedural grounds or based on federal constitutional grounds.

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A. The Petition Presented to the California Supreme Court, As A Whole, Was Denied for Failure to Conform With State Procedures

It rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy. (Wolfe v. North Carolina (1960) 364 U.S. 177, 195.) It is impossible to determine with precision the basis upon which the writ in Crim. 23573 was denied, since the denial was without opinion. (Appen. A.)[3/] However, the petition filed in Crim. 23573 failed to conform

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3. The Ninth Circuit Court of Appeal has determined for the purposes of the exhaustion doctrine. If the denial of a habeas corpus petition does

with California procedural requirements, justifying denial of the petition on procedural grounds.

At the time Crim. 23573 was filed (Mar. 6, 1984) the identical issues were already pending before the California Supreme Court in the petition for hearing, filed in 4 Crim. 15681 on

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Footnote 3 continued:

not include the citation of authority by the California Supreme Court, the petition has been decided on the merits. (Harris v. Superior Court (9th Cir. 1974) 500 F.2d 1124, 1128-1129.) The Harris court did not point to any California authority in support of that proposition, nor has Harris been cited in published California opinions. Furthermore, the Harris shortcut may be appropriate for purposes of the exhaustion doctrine when an original petition for habeas corpus relief is filed in federal court, in order to give a petitioner a federal forum. However, using shortcuts is an inappropriate basis upon which to grant certiorari because of the scarce resources of this Court and the multitude of cases which are clearly within this Court's jurisdiction and worthy of review.

February 6, 1984. Under California law, a petitioner may seek review of his claim only one time. (In re Miller (1941) 17 Cal.2d 734, 735; accord, In re Rodriquez (1975) 14 Cal.3d 639, 654, fn. 18; In re Lynch (1972) 8 Cal.3d 410.) Thus, even though petitioner sought the California Supreme Court's "original" jurisdiction in Crim. 23573 under article VI, section 10 of the California Constitution, he failed to file an original petition. This procedural ground supports the denial of the writ.

Likewise, the nature of the writ filed in the California Supreme Court indicates it was denied for procedural reasons. Petitioner submitted the writ based on the trial record and submitted 26 additional exhibits, many of which were declarations of alleged witnesses. Though it had jurisdiction to

handle the writ, the California Supreme Court is a reviewing court, not designed to conduct evidentiary hearings. (In re Hochberg (1970) 2 Cal.3d 870, 873-874.) When relief has not previously been sought in a lower court, an appellate court may refuse the writ on the basis there has not been an application for relief made in a trial court. (In re Davis (1979) 25 Cal.3d 384, 389; In re Van Heflin (1976) 58 Cal.App.3d 131, 135; In re Hillery (1962) 202 Cal.App.2d 293.) In a case such as this, where the claim is intimately entwined with the facts, denial for failure to apply in the trial court is appropriate.

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B. California Law Prevents a Petitioner for Habeas Corpus Relief From Raising an Issue in a Petition That Was The Subject of a Direct Appeal

Petitioner claims that repeated acts of witness intimidation by the prosecution caused defense witness to invoke their privileges against self-incrimination and thereby denied petitioner a fair trial and due process. (Petn. 41-56.) Though raised in Crim. 23573, under California law, this issue was not properly before the California Supreme Court. Therefore, the issue is not properly presented to this Court.

The issue of witness intimidation was presented as an appellate issue to the California Court of Appeal, which resolved the issue in favor of the judgment. The Court of Appeal wrote:

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"Martin asserts prosecutorial misconduct because the prosecutor wilfully suppressed material evidence. This assertion is based on Martin's assumption the three defense witnesses who asserted their Fifth Amendment privileges did so because another defense witness was arrested. In People v. Ruthford (1975) 14 Cal.3d 399, 406, the court stated: '[W]hen the evidence which is suppressed or otherwise made unavailable to the defense by conduct attributable to the state bears directly on the question of guilt our initial inquiry is whether such conduct resulted in denial of a fair trial.' In this case there is no offer of proof nor evidence the witnesses' decision to not testify was based on any conduct attributable to the state. In fact when the court was advised of the defense witnesses' arrest, the court stated the arrest had 'nothing to do with this Court' although tactically it might have been 'best left undone.' Without conduct attributable to the prosecution there cannot be any wilfull suppression of evidence." (In re Martin (1983) 150 Cal.App.3d 148, 167; emphasis added.)

When presented with the intimidation issue in conjunction with the consolidated petition for writ of habeas corpus in 4 Crim. 15681, the Court of Appeal wrote:

> "The allegations in the petition for writ of habeas corpus concerning prosecutorial misconduct and witness intimidation have been dispensed with on the merits in the opinion on appeal. (See part V, above). A potential witness assertion of the Fifth Amendment privilege against self-incrimination is not conduct attributable to the prosecutor." (In re Martin, supra, 150 Cal.App.3d at p. 168; emphasis added.)

The Court of Appeal's determination of the intimidation issue in conjunction with petitioner's direct appeal, instead of his habeas corpus petition, is significant. It is settled in California that habeas corpus does not lie as a substitute for an appeal or

as a second appeal. (In re Terry (1971) 4 Cal.3d 911, 927; In re Eli (1969) 71 Cal.2d 214, 219.) It is only where the facts alleged indicate the accused has no opportunity to present his contentions at trial, or on appeal, that he may resort to a writ of habeas corpus. (In re Gomez (1973) 31 Cal.App.3d 728, 732.) Petitioner had every opportunity to present his claim of witness intimidation at trial and on appeal. The witnesses he claims were intimidated by the prosecution were obviously accessible to the defense. In fact, Charles Riley and Eugene Wallace asserted their Fifth Amendment privileges from the witness stand in open court. (Petn. 42-46.) Petitioner had an opportunity to explore their motives before the trial court. Yet, petitioner did not even present an offer of proof to show these witnesses

were intimidated by the prosecution. (Compare United States v. Hammond (5th Cir. 1979) 598 F.2d 1008, 1012-1013; United States v. Morrison (3d Cir. 1976) 535 F.2d 223, 225-228; United States v. Smith (D.C. Cir. 1973) 478 F.2d 976, 979.)

The issue of witness intimidation raised on direct appeal was based upon the record produced at the trial. By determining this issue on direct appeal instead of on the habeas corpus petition, the Court of Appeal necessarily rejected petitioner's claim that he was not provided an opportunity to present this issue at trial or on appeal.[4/] Therefore, the issue was not

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4. Petitioner's claim that he had "newly discovered evidence" which justified habeas corpus review on the witness intimidation issue was not persuasive to the Court of Appeal. (See In re Weber (1974) 11 Cal.3d 703, 706; In re Branch (1969) 70 Cal.2d 200, 213-214.)

properly presented to the Court of Appeal by way of habeas corpus.

Just as the Court of Appeal refused to grant petitioner a second appeal on the issue of witness intimidation, the California Supreme Court would not have reached that issue on the merits in Crim. 23573. Accordingly, the witness intimidation issue is not reviewable in this case by this Court. The proper avenue of review for this issue would have been by writ of certiorari from the direct appeal filed in 4 Crim. 13945. Petitioner has expressly avoided doing this. (Petn. 8.)

Because the denial of the writ by the California Supreme Court is supported by adequate and independent state

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grounds, respondent respectfully submits this Court should deny certiorari. (Michigan v. Long, supra, 77 L.Ed.2d 1201.)

II

CERTIORARI DOES NOT LIE WHEN, AS HERE, PETITIONER'S CLAIM OF CONSTITUTIONAL ERROR DEPENDS ON A REVIEW OF THE FACTS TO SEE IF THE STATE COURT'S FACTUAL FINDINGS WERE CORRECT

A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues, nor does it sit for the benefit of the particular litigants. (Rice v. Sioux City Cemetery (1955) 349 U.S. 70, 74.) Certiorari is not granted to review evidence and discuss specific

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facts. (United States v. Johnston (1925) 268 U.S. 220, 227.)

The issues presented by petitioner require an evaluation of the entire trial record to determine whether petitioner is entitled to a new trial. This Court should not be utilized to perform a function more appropriately handled by a lower court.

The first issue presented by petitioner is whether the prosecutor's failure to disclose information about the credibility of two prosecution witnesses constituted a material omission which required a new trial. (Petn. 29-40.) The standard by which omissions are judged is not challenged by the petition. Omissions are material, in the constitutional sense, if the evidence omitted would serve to create a reasonable doubt of guilt that did not

otherwise exist. (Smith v. Phillips (1982) 455 U.S. 209, 219; United States v. Agurs (1976) 427 U.S. 97, 112; Giglio v. United States (1972) 405 U.S. 150, 153-154.)[5/] In order to determine its materiality, an omission must be evaluated in the context of the entire record. (United States v. Agurs, supra, at pp. 112-113.)

To review the denial of the petition for writ of habeas corpus by the California Supreme Court in case number Crim. 23573, would require this

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5. The good faith or bad faith of the prosecutor is immaterial. The effect of misconduct, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes. (Smith v. Phillips, supra, at p. 220, fn 10; Giglio v. United States, supra, at pp. 153-154.) The aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. (Smith v. Phillips, supra, at p. 219.)

Court to evaluate the claimed omissions in light of the entire trial record (including over 2,300 pages of reporter's transcript) and all the exhibits and documents which were before the California Supreme Court. (Petn., 7-10.) Such a review was conducted by the California Court of Appeal in 4 Crim. 15681 which assumed the truth of petitioner's allegations and found:

> "In this case the prosecutor had a duty to disclose to the court the misleading testimony of the prosecution witnesses. The prosecution's failure resulted in the suppression of substantial material evidence concerning the credibility of chief witnesses. Nonetheless we must evaluate whether this affected the outcome of the trial. We are satisfied that had the jury known the witnesses had been promised more lenient treatment in exchange for their cooperation, it would not have affected the verdict. Both witnesses faced severe penal sanctions and the district attorney's offer to intercede

> would only have changed the character of the sanctions. Both witnesses had other motives to testify. Both witnesses' testimony was corroborated by other direct testimony and circumstantial evidence." (In re Martin, supra, 150 Cal.App.3d at pp. 169-170; emphasis added.)

Petitioner does not ask this Court to review the Court of Appeal's determination to insure they applied the correct standard in the correct fashion. In fact, he is careful to point out he is not asking this Court to review the opinion from the Court of Appeal. (Petn. 8.) Rather, petitioner asks this Court to undertake an independent review of the record to determine if, under the facts of this case, the omissions claimed in his petition were material in the constitutional sense. Thus, this case presents a pure factual question for review in this Court. Questions of

fact are not properly the subject for review in this Court. (Grayson v. Harris (1925) 267 U.S. 352, 357-358.) Moreover, such review would be duplicative of the California Court of Appeal's effort and an inappropriate drain on this Court's scarce resources. Accordingly, the petition for writ of certiorari should be denied.

III

CERTIORARI SHOULD NOT BE GRANTED SINCE THERE IS NO CONFLICT IN THIS COURT'S CASES ON THE PROPER STANDARD OF PREJUDICE WHEN THERE HAS BEEN WITNESS INTIMIDATION BY THE PROSECUTION, NOR DOES THIS PETITION PROPERLY RAISE THE ISSUE

The second issue presented by the instant petition concerns the proper standard of prejudice to be applied where there has been intimidation of defense witnesses by the prosecution.

(Petn. 41-56.) To justify review, petitioner argues there is a conflict in this Court's opinions concerning the proper standard of review. (Petn. 55-56.) There is no conflict in the law. Furthermore, petitioner presents this Court with an academic exercise since the issue is not properly raised by this petition.

A. There is No Conflict in the Law

Certiorari should not be granted in this case because there is no conflict in this Court's cases on the proper standard of prejudice for witness intimidation. Petitioner contends the materiality requirement of United States v. Valenzuela-Bernal (1982) 458 U.S. 858, is in conflict with the reversible per se standard of Webb v. Texas (1972) 409 U.S. 95, and that this conflict justifies

review by this Court. (Petn. 55-56.) Petitioner's premise is incorrect. Webb did not establish a reversible per se rule.

In Webb, there was no discussion of the proper standard of review to be applied where a prospective defense witness was intimidated by the state. (Webb v. Texas, supra, 409 U.S. at p. 98.) Clearly, Webb did not create a reversible per se rule. This conclusion follows from United States v. Valenzuela-Bernal, supra, 458 U.S. 858, wherein this Court held there must be a reasonable likelihood the witness' testimony could have affected the judgment of the trier of fact. (Id., at pp. 872-874, applying the test applicable to cases involving the Due Process Clause of

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the Fifth Amendment; see Giglio v. United States, supra, 405 U.S. at p. 154.)[6/]

The dissent in Valenzuela-Bernal did not cite Webb to suggest a reversible per se standard applied on this issue, nor did the dissent attack the prejudice requirement set out in the majority opinion. (United States v. Valenzuela-Bernal, supra, 458 U.S. at pp. 879-885, (Brennan, J. dissenting).) Furthermore, this Court has never cited Webb in conjunction with this issue.

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6. As pointed out in footnote 5, supra, the good or bad faith of the prosecutor is immaterial to the prejudice determination. Petitioner relies on Freeman v. State of Georgia (5th Cir. 1979) 599 F.2d 65 to suggest bad faith justifies a different rule. (Petn. 49-51.) Petitioner's reliance on Freeman is misplaced. Freeman applied the same standard of error for the prosecution's bad faith conduct as this Court applied in Valenzuela-Bernal. (Freeman, supra, at pp. 69-70.)

This Court has consistently followed Valenzuela-Bernal to reverse cases wherein lower courts applied a standard of review akin to per se reversible error in witness intimidation cases. (United States v. Armijo-Martinez (1982) 459 U.S. 810 [669 F.2d 1131]; United States v. Marquez-Amaya (1982) 458 U.S. 1118, on remand, 686 F.2d 747.) Recently this Court has reaffirmed Valenzuela-Bernal's harmless error analysis in conjunction with the Sixth Amendment's right to counsel. (United States v. Cronic (May 14, 1984) ___ U.S. ___ [80 L.Ed.2d 657, 667].) The overwhelming bulk of authority supports application of the Valenzuela-Bernal rule on the issue of prejudice.

For the proposition that Webb created a per se reversible error rule,

petitioner cites United States v. McDonald (5th Cir. 1980) 620 F.2d 559, 564 and United States v. Hammond, supra, 598 F.2d 1008, 1013. (Petn. 55.) Both of these cases were decided prior to Valenzuela-Bernal. Accordingly, their reliance on Webb as creating a reversible per se standard is suspect. No conflict in the law currently exists. Therefore, the petition for writ of certiorari should be denied since there is no compelling legal issue presented to the Court.

B. Even Assuming A Conflict In the Law, This Petition Does Not Present the Issue of the Proper Standard of Review

As outlined above, the California Court of Appeal decided the issue of witness intimidation in petitioner's direct appeal, thereby

precluding the issue's consideration by way of habeas corpus in state court. (See Argument I (B), supra.) If the issue is worthy of review by this Court, that review must come in conjunction with the direct appeal. The issue is not properly before this Court in the present petition.

Furthermore, the issue is not worthy of review in this case because the issue of prejudice is not clearly presented. Before this Court could reach the prejudice issue, there would have to be a review of the entire record to determine, (1) if witnesses were, in fact, intimidated; (2) if so, was the intimidation the result of any conduct attributable to the prosecution; (3) if so, was the intimidation by the prosecution the result of misconduct (if, as petitioner contends, bad faith changes

the evaluation process); and (4) if all the above requirements have been met, was there prejudice. Petitioner raises an issue which depends on the specific facts of his case and requires a factual review by this Court.[7/]

Significantly, because this case requires this Court to make factual findings as a predicate to reaching the prejudice issue, it is possible the

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7. The California Court of Appeal engaged in a factual review of the appellate record and determined there was no showing of witness intimidation, nor was there any showing the assertion of the Fifth Amendment privilege by the witnesses was the result of "any conduct attributable to the state." (In re Martin, supra, 150 Cal.App.3d at p. 167; emphasis added.) Not only was there a finding there was no intimidation by the prosecution, there was a finding the assertion of the privilege was not attributable to any conduct by the prosecutor. Considering the scope of review below, for this Court to inject itself in this factual dispute would be an inappropriate waste of this Court's resources.

prejudice issue would not even be reached by this Court. A factual finding favorable to respondent (such as the finding made by the Cal. Court of Appeal) would prevent this Court from reaching the issue. Certiorari should not be granted on the chance an issue worthy of consideration might be presented.

The factual posture of this case is contrasted with Webb v. Texas, supra, 409 U.S. 95, and United States v. Valenzuela-Bernal, supra, 458 U.S. 858, the cases which petitioner contends create a conflict in the proper standard of error to be applied for improper witness intimidation. (Petn. 56.) In Webb, judge's comments to the prospective defense witness were part of the appellate record and the impact of the comments was evidence from the record.

(Webb v. Texas, supra, 409 U.S. at pp. 95-97.) No factual dispute was presented. Similarly, there was no factual issue presented in Valenzuela-Bernal. The government deported the prospective defense witnesses thereby making the witnesses unavailable to the defense. (United States v. Valenzuela-Bernal, supra, 458 U.S. at pp. 872-874.)[8/] In Webb and Valenzuela-Bernal, a constitutional issue was squarely presented. This petition does not squarely present a constitutional issue. At most, it presents a factual dispute. This Court is not the proper forum to air factual

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8. In Washington v. Texas (1967) 388 U.S. 14, another Sixth Amendment compulsory process case, petitioner was deprived of a defense witness by virtue of a Texas statute which made the witness incompetent to testify on behalf of petitioner. (Id., at pp. 22-23.)

disputes. (Rice v. Sioux City Cemetery, supra, 349 U.S. at p. 74; United States v. Johnston, supra, 268 U.S. at p. 227; Grayson v. Harris, supra, 267 U.S. at pp. 357-358.) Accordingly, the petition should be denied.

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CONCLUSION

For the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
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LRH:cl/bah
8/30/84
SD84US0002

APPENDIX A

ORDER DENYING WRIT

OF HABEAS CORPUS

Criminal No. 23573

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
APR 19, 1984
LAURENCE P. GILL, Clerk

Deputy

In re HERMAN G. MARTIN

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

Bird, C.J. and Kaus , J., are of the opinion the petition should be granted.

BIRD

Chief Justice

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF CALIFORNIA

Art. VI, § 10

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

Superior courts have original jurisdiction in all causes except those given by statute to other trial courts.

The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

CALIFORNIA EVIDENCE CODE

Section 1150.

(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

CALIFORNIA PENAL CODE

Section 1506.

An appeal may be taken to the court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court. Such appeal shall be taken and such application for hearing in the Supreme Court shall be made in accordance with rules to be laid down by the

Judicial Council. If the people appeal from an order granting the discharge or release of the defendant, or petition for hearing in either the court of appeal or the Supreme Court, the defendant shall be admitted to bail or released on his own recognizance or any other conditions which the court deems just and reasonable, subject to the same limitations, terms, and conditions which are applicable to, or may be imposed upon, a defendant who is awaiting trial. If the order grants relief other than a discharge or release from custody, the trial court or the court in which the appeal or petition for hearing is pending may, upon application by the people, in its discretion, and upon such conditions as it deems just stay the execution of the order pending final determination of the matter.

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

APR 19 1984

I have this day filed Order

No. S2DA0834

Entered by CC

Date Rec'd 4-23-84

HEARING DENIED Bird C.J.

[illegible] OF THE OPINION THAT PETITION SHOULD BE GRANTED.

In re: 4 Crim. *No.* 13945/15681

HERMAN G. MARTIN on habeas corpus

vs.

Respectfully,

Clerk

BEST AVAILABLE COPY

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
LOUIS R. HANOIAN
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110 West A Street, Suite 700
San Diego, California 92101

No: 83-2057
October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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For Delivery to Hon. Donald W. Smith

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 11 day of September, 1984.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 11, 1984.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 11th day of September, 1984.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986

Office - Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS
CLERK

(3)

No. 83-2057

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY MEMORANDUM

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October Term, 1983

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No.: 83-2057

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1983

HERMAN G. MARTIN,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY MEMORANDUM

I. THE PETITION PRESENTED TO THE CALIFORNIA SUPREME COURT COMPLIED WITH STATE PROCEDURES IN EVERY RESPECT

Respondent in his brief in opposition to petitioner's Petition for Writ of Certiorari argues that said petition should be denied by this Court, contending that petitioner "failed to conform to California procedural requirements" in filing the Petition for Writ of Habeas Corpus in Crim. 23573 (Opposition, pp. 15-16). Specifically, respondent asserts that the petition was not properly brought before the California Supreme Court because (1) under California law, Habeas Corpus cannot be employed as a "second appeal" and at the time Crim. 23573 was filed, "the identical issues were already pending before the

California Supreme Court [in a Petition for Hearing on petitioner's direct appeal]" {Opposition, pp 16-17, 22}; and {2} because the California Supreme Court is not designed to conduct evidentiary hearings, the original application for a Petition for Writ of Habeas Corpus should have been made in the trial court {Opposition, pp. 17-18}.

Both of respondent's contentions are devoid of merit.

Initially, petitioner would note that while it is true that under California law Habeas Corpus ordinarily should not be used as a second appeal {see, In re Foss {1974} 10 C.3d 910, 930}, it is manifest that petitioner at no time has attempted to use the Habeas Corpus procedure as a "second appeal"

in the instant case. Petitioner in connection with the instant proceedings brought to the attention of the California Supreme Court numerous allegations of blatant prosecutorial misconduct which could not be resolved by way of direct appeal, quite simply, because the documentation supporting such allegations was beyond the scope of the trial record and because the investigation verifying the incidents of prosecutorial misconduct in question extended well beyond the conclusion of petitioner's trial. These facts justifying the filing of a Petition for Writ of Habeas Corpus have in fact been alleged in petitioner's moving papers in the present case {see, Petition in 83-2057, pp 27-28}.

Accordingly, although limited

issues relating to prosecutorial misconduct were raised by way of direct appeal, a full hearing on the merits of these issues, at least by way of direct appeal, was precluded because the record on appeal necessarily did not include all of the documentation essential to a proper resolution of petitioner's claims. It is precisely this type of situation that justifies a petitioner seeking relief by way of habeas corpus under California law. For example, in People v. Pope (1979) 23 Cal.3d 412, 428-430, the defendant sought review of his claims of inadequacy of trial counsel by way of direct appeal; the California Supreme Court held that the trial record contained insufficient documentation of his claims but that habeas corpus was available to the defendant for the

purpose of allowing the defendant to fully litigate his claims at an evidentiary hearing.

Clearly, relief by way of habeas corpus is available where there has been no opportunity to properly raise the issue in question on appeal, see, In re Spencer {1965} 63 Cal.2d 400, 405,406, and respondent concedes this fact {Opposition, at p. 22, citing In re Gomez {1973} 31 Cal.App.3d 728, 732}. As has been alleged in the petition now before this court, {at pages 27-28}, habeas corpus provided the only meaningful remedy for review of his allegations of prosecutorial misconduct. Respondent's assertion to the contrary not withstanding, petitioner has not used habeas corpus as a "second appeal" and there is no

merit for his assertion that certiorari should be denied on this ground.[1]

Respondent's contention that his Petition for Writ of Habeas Corpus, having been filed in the California Supreme Court as opposed to the trial court, was procedually defective for this reason, must likewise fail. California law permits a Court of Appeal to consider a Petition for Writ of Habeas Corpus in conjunction with a

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1. The fallacy of respondent's assertion that petition in this case attempted to use habeas corpus as a second appeal is apparent from the language of the Court of Appeal Opinion cited by him {Opposition, at pp 20-21}. That language indicates that the Court of Appeal, although entertaining the Petition for Writ of Habeas Corpus, never considered the documentation of the allegations contained therein, whereas the appropriate procedure would have been to grant petitioner an evidentiary hearing on the truth of his allegations {see, argument II, infra.}

related appeal pending, subject to the discretion of the Court of Appeal {In re Rinegold {1970} 13 Cal.App.3d 723, 725, n.1.} In this case, the Court of Appeal chose to exercise its discretion and consolidate petitioner's Petition for Writ of Habeas Corpus with his direct appeal {Opinion of the Court of Appeal, Exhibit "Y" attached to Crim. 23573, p. 24; In re Martin {1983} 150 Cal.App.3d 148}. The Court of Appeal thereafter denied the petition. Manifestly, it would have been a futile act to seek habeas corpus relief in any forum other than the California Supreme Court. While the latter Court is indeed not a trial court designed to conduct evidentiary hearings, California procedure provides that a reviewing court in considering a Petition for Writ of Habeas Corpus, may order the

matter transferred to a lower court or to a special referee for purposes of conducting an evidentiary hearing on petitioner's claims. See, e.g., In re Lower {1979} 100 Cal.App.3d 144, 152-153. This in fact was the procedure that should have been followed by the California Supreme Court in the present case upon petitioner's unmistakeable prima facie showing that he was entitled to relief by way of habeas corpus. In any event, the petition in every respect has properly complied with State Court procedures in presenting this matter and respondent's suggestion to the contrary must therefore be rejected.

II. THE INSTANT PETITION DOES NOT PRESENT FACTUAL ISSUES, AS DISTINGUISHED FROM LEGAL ISSUES, TO THIS COURT FOR ITS RESOLUTION

Respondent, characterizing the instant petition as a request that this Court "undertake an independent review of the record {...including over 2,300 pages of reporter's transcript}" to determine the materiality of the issues raised therein, argues that Certiorari should be denied because "Questions of fact are not properly the subject for review in this Court." {Opposition, pp. 28-30}. Respondent however, misanalyzes the problem. His contention, because it is grounded upon a faulty promise in the first instance, must be rejected.

Respondent does correctly observe that petitioner by way of the instant petition is not seeking review of the opinion of the Court of Appeal in In re Martin, supra.[2] Rather, he seeks review of the Order of the Supreme Court of California denying his Petition for Writ of Habeas Corpus in Crim. 23573 {Petition, page 10}. Under any rational reading of the allegations contained in that latter petition, petitioner clearly and unmistakably has made out a prima facie case for

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2. Although respondent asserts that "Petitioner has expressly avoided" seeking review by this Court of the opinion of the Court of Appeal in 4 Crim. 13945 {the direct appeal}. {Opposition, pp 24, 29}. Petitioner would note that such a petition has been filed separately {83-2062}. Obviously, separate petitions are necessary so as to avoid seeking certiorari to different courts in the same petition.

relief.

Indeed, the nature of the allegations contained in Crim. 23573 and the documentation offered in support thereof, which will not be repeated in this Reply, render an "independent review" of the record, either by the California Supreme Court or by this Court, superfluous. The sole issue to be resolved upon review by the California Court was, "can petitioner prove his allegations in open Court?" If so, he is entitled to a reversal of the judgment; petitioner's right to a hearing however, cannot be the subject of serious dispute.

As the Ninth Circuit recently held in U.S. v. Lord {9th Cir. 1983} 711 F.2d 887, 891:

> "...an unrebutted prima facie showing of prosecutorial misconduct that could have prevented a defense witness from giving relevant testimony justifies remand for an evidentiary hearing."

For the foregoing reasons, respondent's assertion petitioner is demanding a review of the trial record by this court is, quite simply, inaccurate. Such a review would indeed be a waste of time in light of the fact that the Opinion of the Court of Appeal, attached, to Crim. 23573 as Exhibit "Y", has already found that the prosecutor willfully suppressed <u>substantial material</u> evidence {at pp 27-28, emphasis added}. In view of this conclusion, all that remained for the California Supreme Court to do upon review of Crim. 23573 was to issue an order to show cause and remand the

matter for an evidentiary hearing. In re Lawler (1979) 23 Cal.3d 190, 194; In re Lower, supra.

From the language of the Court of Appeal, it is likewise apparent that Respondent's suggestion, i.e., that the issues of the correct standard of review is not raised by the instant petition, must also fail (opposition, p. 29). As petitioner pointed out in his petition, where, as here, substantial material evidence is suppressed, relief is appropriate (at p 39). The Court of Appeal, when faced with allegations which if true justified a new trial, see, Giglio v. United States (1971) 405 U.S. 150, 153, apparently applied an incorrect standard for granting relief as evidenced by its failure to issue an

order to show cause. It therefore devolved upon the California Supreme Court, upon review of Crim. 23573, to apply the correct standard and grant relief in the form of an evidentiary hearing. The California Supreme Court's refusal to do so was a perpetuation of the error of the Court of Appeal and on its face, a contravention of the mandates of this Court. No further review of the trial record is necessary to establish this fact.

III. REVIEW OF THE INSTANT CASE BY THIS COURT IS NECESSARY IN ORDER TO INSURE UNIFORMITY OF DECISION

A. A Conflict in the Law Currently Exists on the Issue of the Standard to be Applied in Determining Whether the Intimidation of Defense Witnesses by Prosecutorial Authorities is Reversible Error

Respondent citing this Court's opinion in United States v. Valenzuela-Bernal {1982} 458 U.S. 858, asserts that there is no conflict in the case law regarding the issue of the standard to be applied in determining whether intimidation of defense witnesses by the prosecution is reversible error {Opposition, at pp 34-35}. Petitioner would only note that even since this Court's opinion in Valenzuela-Bernal, supra, the lower federal courts have

continued to exhibit considerable confusion in identifying, articulating and applying the standard for reversal in cases involving intimidation of defense witnesses by the prosecution. See, e.g., United States v. Blackwell {D.C. Circuit 1982} 694 F.2d 1325, 1341-1342; United States v. Smith {1983} 577 F.Supp. 1232, 1237, n.5.[3]

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3. The Smith court, in discussing the right of a defendant to compulsory process in the context of harassment of defense witnesses by the prosecution, observed: "It is not entirely clear if this right is grounded in the Due Process Clause of the Fifth and Fourteenth Amendments, the Sixth Amendment, or both. United States v. Valenzuela-Bernal 458 U.S. 858,... {1982}; United States v Hammond, 598 F.2d at 1012 n. 3; United States v. Morrison, 535 F.2d at 226 n. 6. Nor is it clear whether or not, to establish the existence of the right in a particular case, prejudice must be shown. United States v. Blackwell, 694 F.2d 1325, 1341 {D.C. Cir. 1982}; United States v. Thomas, 488 F.2d at 335. {emphasis added}

B. The Question of the Proper Standard for Review In Cases Involving Intimidation of Defense Witnesses is Placed Squarely Before this Court by Virtue of the Instant Petition

Respondent in his Opposition asserts that the instant petition presents this Court not with the issue of the proper standard of review in cases involving defense witnesses by the prosecution, but rather with a request of this Court to review the entire record for purposes of determining if the errors which occurred herein were prejudicial (Opposition at p 36). Respondent's erroneous characterization of the instant petition has previously been addressed in this reply (see, argument II, supra). Clearly, such "review" of the record would be utterly

superfluous in view of the fact that under any rational reading, petitioner's allegations make out a prima facie case for relief.

In view of this fact and in view of the fact also that the California Supreme Court at the time of its order in the instant case had before it the factual finding of the Court of Appeal that the suppressed testimony was "material" {Exhibit Y, attached to the California Supreme Court Petition}, it is apparent that the issue of the proper standard of review is directly before this court. Obviously, the California Supreme Court employed an incorrect standard in summarily refusing to issue an Order to Show Cause in the instant case and order that an evidentiary hearing on petitioner's

allegations be conducted.

Respectfully submitted,

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